No. 15267

UNITED STATES COURT OF APPEALS

For The Ninth Circuit

PERCY HOOD and GRACE HOOD, His Wife,
Appellants

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellants' Reply Brief

Appeal from the United States District Court for the Western District of Washington, Northern Division

Donald M. Bushnell,
Ferndale, Washington,
Attorney for Appellants.

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CITATIONS

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APPELLANTS' REPLY BRIEF

ARGUMENT

Appellants respectfully submit that neither by logic or authority has the United States countered their contentions. We consider its answers in their order.

I.

Did the 1926 Act constitutionally impose a lien upon lands theretofore patented to individual Indians?

A. Did the Act refer to the lands here involved? — We had shown that the very sentence imposing the lien then said that the same "shall be recited in any patent issued therefor" — an impossibility because the lands had already been patented. All the United States could do was to permit a deed by the heirs. But appellee says that since all of the reservation land had been patented, and that this was reported to Congress, we must assume that Congress, by the term "Indian Land" meant to refer to the lands of the patentees. If so, the quoted reference must be read out of the Act, and we must assume without acquiescence, that as to the other questions discussed this Court will do so.

B. Did Congress have the power to impose the lien? — Likewise, on that assumption, appellee is forced to the dilemma stated in our brief (p. 27-28): Either the Indian heirs owned the land in fee simple or they did not; if they did, either the Act flaunted due process, or "fee simple" has another meaning when applied to the property of an Indian, and will permit, as against him, that which it would safeguard for a white man.

Appellee nowhere challenges the fee character of the title involved. Nor does it challenge, in law or in fact, our contention (brief, 30, 31) that in the passage of the Act (in its character as sheer fiat) there is no compliance with the mechanics of due process. So when it says that our claim of unconstitutionality is not "supported" it can only be taken to contend that Congress may, of its own whim, fetter the title.

Appellee completely fails to meet our challenge to produce any specific authority to sustain any such power. It apparently means to infer that such power can be found by analogy from the holdings of the court sustaining the right of the United States to postpone the periods in which certain Indian allottees and patentees were restricted from alienating; or to manage or even dispose of unalloted tribal lands held in common; or to be free from powers of state condemnation or taxation. Likewise it points to the holdings that the granting of citizenship to Indians has not diminished those powers. It cites U.S. vs. Gilbertson 111 F. 2d 978; U.S. v. Celestine, 215 U.S. 278, 54 L. Ed. 195, 30 S. Ct. 93, Heckman v. U.S., 224 U.S. 413; 56 L. Ed. 820, 32 S. Ct. 424; Tiger v. Western Investment Co., 221 U.S. 286, 55 L. Ed. 738, 31 S. Ct. 578.

But to say that because Congress has such powers

it has the entirely different power to invade private property of Indians is wholly a non sequitur. The nature and purpose of those powers need not be elaborated here. They are fully expounded at length in the cited cases. They are consistently founded on the right and duty of the United States to protect a weak people yet in a condition of pupilage. Their applications occurred mostly in the Plain states, when the land hunger and greed of both whites and some Indians created evils which the Indians, themselves, lacked the resources to combat. It was those considerations that led to the intervention of the United States to prolong the guardianship and to sue to cancel the conveyances made in violation of law, which were indeed void, but which in practice were used to deprive the Indians of the lands which were rightfully theirs. It was this concern which constituted the "national interest" to which Justice Hughes referred in the Heckman case, which appellee quotes.

All of these cases were brought to protect and preserve the properties of the Indians. But if it is true that the power to tax is the power to destroy, then it is true that the power arbitrarily to encumber private property is also the power to destroy or take. Such an Act is then, not the exercise of the power to preserve. The power to protect cannot give birth to its very opposite, as appellee contends.

Obviously those cases are not in point. We are not here concerned with the duration of restrictions; the case, in this phase, assumes their existence. Nor is the question of citizenship involved; indeed we argue that due process extends to the non-citizen; nor are there any questions of taxation, nor of tribal lands.

Appellee does not attack our authority denying the power of Congress in this case. In our brief (p. 22-

23) we were content to quote the text of 27 Am. Jr. 548 and 551 that the private rights of Indians were constitutionally secure. We deemed the proposition self evident. However, we now note the supporting case of Mott vs. United States, 283 U.S. 747, 75 L. Ed. 1385, 51 S. Ct. 642. Where an incompetent Indian's lands were leased for oil; huge royalties piled up; the Indian with the consent of the Secretary of the Interior gave $500,000.00 to his wife who promptly divided with defendants having knowledge of all of the facts. Sustaining judgment to recover the Court said:

> **"While the Secretary is authorized to prevent an improvident alienation he is not authorized to alien or lease in the stead of the allottee. If the latter chooses not to (alien or lease) the Secretary cannot do so for him, even though it appears that the Indian would be benefited. That fund was individual property and as such was within the protective guaranties of the Constitution".**

By this logic, if the Yahimaloo heirs in this case, had they been requested, could have refused to contract for the diking lien. If Congress could not compel their signature to a contract, how much the less could it, ipso facto, impose a lien without even making the request.

In Jones v. Meehan, 175 U.S. 1, 44 L. Ed. 49, the facts boil down to a finding that by treaty an Indian chief had immediately acquired an equitable title and that notwithstanding that a patent had not been issued, Congress had no right as against the grantees of his heirs to attempt to limit or control his rights in the land. The court held that because of the manifest superior advantages of the United States in negotiating treaties with Indians, words should be con-

strued with the meaning which Indians would attach to them. Now the Lummi treaty gave the President discretion to make allotments and patents. Can it be doubted that the Indians would assume that they were to have them as a matter of right. At any rate the President and his aids did so construe them for some 70 years. Their only source was the treaty. The Indian title being one in fee simple, how could Congress by mere fiat mortgage their lands any more than it could restrict Chief Moose's rights?

See also Choate v. Trapp, 224 U.S. 665, 56 L. Ed. 941, 32 S Ct. 565, holding that rights to tax exemption under a treaty were vested and protected by due process.

Appellee exaggerates the importance of the distinction we made as to trust patents and restricted fee patents. We intended merely to point out that a fee title on its face has a stronger character than does an equitable one. What particular rights an Indian would have under a trust would depend upon the terms of the treaty or statute creating it, but a fee would need no interpretation. In a trust arrangement the trustee (U.S.) might, even have discretionary powers as to the granting or rescinding of allotments. That the courts considered trust allotments as something less than fees is shown by the reference in U.S. v. Rickert, 188 U.S. 432 (436) to the term not being "happily chosen", and also by the note to Minnesota v. U.S. 305 U.S. 382, 83 L. Ed. 235 (cited by appellee) describing the contention of a state that it had power to condemn Indian land as "stronger" in the case of restricted fees than in trust allotments.

Nor is there applicability to the case at bar in the holding that for inheritance tax purposes only in the

Oklahoma oil area trust allotments and restricted fees are to be treated alike. Obviously such a tax could be levied on the value of either. West v. Oklahoma Tax Comm'n, 334 U.S. 717, L. Ed. S. Ct.

Appellee paints us as relying mainly on Ross v. Eells, 56 Fed. 855 and U.S. v. Kopp, 110 Fed. 160 and Eastman v. U.S. 28 F. Suppl 807. "to support our constitutional argument." But the first two cases were cited simply in support of the fee simple nature of the title here involved. Our Washington court, in so holding in Guyatt v. Kautz, 41 Wash. 115, 83 Pac. 9, was well aware that the first had been reversed on other points when it adopted it as authority on that point. Nor does the fact, that we may concede that Judge Hanford's ultimate holding in U.S. v. Kopp, supra, that citizenship, plus patenting of all of the reservation land, had the effect of terminating the guardianship over the Indians was erroneous, deprive that case of its authority on the fee simple question.

Likewise the reversal of the Eastman case in U.S. v. Eastman, 118 F. 2d 421, cannot give appellee any comfort. The earlier case held as a matter of principle that an Indian allottee (or fee holder, it is not clear which) had vested rights which could not be interfered with. The court deemed the attempt to require the Indian owners to conform to a certain pattern of timber cutting was such an interference. The Circuit Court did not in substance differ with the principle of vested rights. It simply held, and we concede, correctly, that because the Secretary of the Interior had the right to forbid alienation in any respect, he could demand such compliance as a condition to his consent to the sale of timber; in short that his right to deny permission included the right to deny permission for part. The court was far from holding

(as would be parallel to the case at bar) that had the Indians not wished to sell timber he could not have compelled them to sell at all, much less on a prescribed pattern.

II.

Can equitable considerations be invoked to pass title to appellants prior to approval of the deed by the Secretary?

We welcome appellee's admission (its brief, 13) that the equitable considerations developed in our brief "do and should apply in certain cases" but, not to this case, it says. Let us examine the attempted grounds of distinction.

We find that as to all of them, the argument is bottomed on the idea that the 1926 Congress, in passing the Act, had created new duties upon the Secretary and new burdens on the transaction; that in all phases of these contentions appellee could ignore the acts and laws existing in November 1925 when negotiations were had, and ignore the trial court's finding that all of the Hood transactions complied with existing law and regulations. In other words: it is contended that a subsequent Congress can undo the rights achieved under the lawful acts of its predecessor. Absent this alleged and novel power of Congress our contentions, it seems, are admittedly sound.

First, appellee says that the Secretary could not "fly in the face" of the 1926 Congress and grant a title free of the lien created by it. This clearly begs the question. He was only required to honor the "Memorandum of Sale" executed by his own authority delegated to his subordinate, the Indian Agent, and sanctioned by the only law that could apply to it, the law existing in 1925.

Next it says that there could be no equitable con-

version as to title, because such presupposes that the parties were capable of performance at the time, and nothing remained to be done but the payment of money. It forgets, as to the latter, that the money, in the form of the cash and notes bargained for, were paid and made in November 1925. As to the former, he says the Indian heirs did not have a title they could pass in November. But they had a fee which under existing law they were entitled to sell if they proceeded by the regulations. They had, in other words, the right recognized by existing law to cause to be executed in their behalf the "memorandum of sale" which, so far as they were concerned, was binding upon them and the Hoods. Thus, in November, rights accrued. That they were subject to defeasance by disapproval by the Secretary did not annihilate the rights; it merely made them subject to a conditional subsequent.

Appellee denies that the doctrine of relation back from the date of delivery of a deed to the date of its execution can be invoked, because, it says, rights of an innocent **third** party have intervened and because the result would be unjust. The third party, appellee says, is itself. It so contends in the face of the fact of its own participation in the deal; in the face of its own laws and regulations requiring it in proper instances, through the Secretary and his subordinates, to arrange such deals; in the face of the signature of its own authorized agent on the "memorandum"; in the face of its possession of the Hoods' notes and cash. The third parties, who were to be protected under the cases from the application of the doctrine were all innocent and subsequent purchasers. In the cases cited in our brief when the third parties had knowledge their claims were held to be null.

As to injustice barring the doctrine, all of the cases say that its purpose is to prevent injustice, and such preventable injustice is to be found in the loss of contractual rights otherwise resulting from the failure to apply the doctrine. None of the cases have ever suggested that convenience to a third party, the obtaining of some right or power such as the lien in this case, by which the third party wished to subserve some purpose of its own, would override the right of the contracting party, to his due under his contract.

Appellee says that the project increased the value of the lands and that appellants should help pay for it. Whatever may be said as to the effect on other lands, appellants and their co-plaintiffs in this cause vehemently deny that as to their lands. Certainly the point was not in issue or litigated herein and its very assumption here is arbitrary. To the extent that appellants had rights under the contract the attempt to enforce the liens upon them is an outright denial of due process.

Appellee's contentions come down to this:— we entice you into a contract, take your money and notes and give you a promise; while we are going about effecting our promise we decide we want to do something for someone else; so while with one hand we hold on to your money and notes, with the other we heap upon our promises burdens to you that were never thought of; burdens for the benefits of others; but we are the sovereign; we can change our minds but you can't; take it and like it; the Constitution — what is that?

III.

Are appellants liable for maintenance charges?

Appellee says these charges are authorized by Acts

and appropriations passed by Congress subsequent to the time appellants obtained their approved deed, wherein Congress said that the same should be "reimbursable". Government appeal counsel is not familiar with the facts. Actually the charges for maintenance included in the foreclosure judgement were regular routine annual charges such as were mentioned in the proposed agreement sought from the plaintiffs in this case. But, even if they were based upon the said subsequent appropriations, appellee finds sanctions for them in the "contemplation" (the mental attitude) of Congress that reimbursement should be made and that appellants and others should be the victims as to payment because there was no one else they could be imposed upon. These are indeed novel sanctions. That no authority is cited for their support is not surpising. That portion of the judgment is without foundation regardless of the other phases of the case.

Conclusion

The alleged lien could not have been constitutionally imposed upon the Indian titles. Also, the Hoods' title, in order to effect the justice required by the sale to them, related back to before the Act. In any event there is no sanction for the maintenance charges.

Respectfully submitted,

Donald M. Bushnell

Attorney for Appellants

RECORD-FERNDALE